

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

American Municipal Power, Inc.,	)	Case No. <u>18-1958</u>
	)	
Petitioner,	)	NLRB Case No. 10-CA-221403
v.	)	
	)	
National Labor Relations Board,	)	<b><u>Petition for Review</u></b>
	)	
Respondent.	)	

American Municipal Power, Inc. hereby petitions the Court for review of the Decision and Order of the National Labor Relations Board, 366 NLRB No. 160, entered on August 14, 2018. A copy of the Decision and Order is attached.

Respectfully submitted,

/s/ Kerry P. Hastings  
Kerry P. Hastings  
Taft Stettinius & Hollister LLP  
425 Walnut Street, Suite 1800  
Cincinnati, OH 45202-3957  
(513) 381-2838  
E-mail: [hastings@taftlaw.com](mailto:hastings@taftlaw.com)

Attorney for Petitioner American  
Municipal Power, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Petition for Review was served upon Meagan B. Dolleris, counsel for Respondent National Labor Relations Board, Region 10, Nashville Resident Office, 810 Broadway, Suite 302, Nashville, TN 37203, and upon Joe P. Lesinski, Jr., counsel for International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 816, Branstetter, Stranch & Jennings, PLLC, The Freedom Center, 223 Rosa L. Parks Avenue, Suite 200, Nashville, TN 37203, via regular mail, postage prepaid, this 24th day of August, 2018.

s/ Kerry P. Hastings

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**American Municipal Power, Inc. and International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 816. Case 10-CA-221403**

August 14, 2018

**DECISION AND ORDER**

BY MEMBERS PEARCE, KAPLAN, AND EMANUEL

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on June 4, 2018, by International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 816 (the Union), the General Counsel issued the complaint on June 14, 2018, alleging that American Municipal Power, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 10-RC-213684. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On July 5, 2018, the General Counsel filed a Motion for Summary Judgment. On July 10, 2018, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, and the General Counsel filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification of representative on the basis of its contention, raised and rejected in the underlying representation proceeding, that the unit is not appropriate under the Act because it includes employees who do not share a community of interest with the employees who should be in the unit.<sup>1</sup>

All representation issues raised by the Respondent were or could have been litigated in the prior representa-

tion proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor has it shown any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent has been an Ohio corporation with a hydroelectric power-generation plant in Smithland, Kentucky, and has been engaged in the generation, transmission, and distribution of electric power and energy.

In conducting its operations described above, the Respondent annually purchases and receives at its Smithland, Kentucky power plant, goods valued in excess of \$50,000 directly from points outside the Commonwealth of Kentucky.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

**A. The Certification**

Following the representation election held on February 23, 2018, the Union was certified<sup>2</sup> on March 6, 2018, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Operator I and Operator II employees employed by American Municipal Power, Inc. at its facility located at 1297 Smithland Dam Road, Smithland, Kentucky, excluding office clerical employees, professional employees, confidential employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

<sup>1</sup> The Respondent's answer denies par. 6 of the complaint, which sets forth the appropriate unit. The unit issue, however, was fully litigated and resolved in the underlying representation proceeding. Accordingly, the Respondent's denial of the appropriateness of the unit does not raise any litigable issue in this proceeding.

<sup>2</sup> By unpublished order dated May 31, 2018, the Board denied the Respondent's request for review.

*B. Refusal to Bargain*

By letters dated April 10 and May 14, 2018, respectively, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees. Since about April 10, 2018, the Respondent has failed and refused to do so.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By failing and refusing since April 10, 2018, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

## ORDER

The National Labor Relations Board orders that the Respondent, American Municipal Power, Inc., Smithland, Kentucky, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 816, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time Operator I and Operator II employees employed by American Municipal Power, Inc. at its facility located at 1297 Smithland Dam Road, Smithland, Kentucky, excluding office clerical employees, professional employees, confidential employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Smithland, Kentucky, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 10, 2018.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 14, 2018

Mark Gaston Pearce,

Member

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

AMERICAN MUNICIPAL POWER, INC.

3

---

Marvin E. Kaplan, Member

---

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 816 (the Union) as the ex-

clusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

All full-time and regular part-time Operator I and Operator II employees employed by us at our facility located at 1297 Smithland Dam Road, Smithland, Kentucky, excluding office clerical employees, professional employees, confidential employees, guards, and supervisors as defined in the Act.

AMERICAN MUNICIPAL POWER, INC.

The Board's decision can be found at [www.nlr.gov/case/10-CA-221403](http://www.nlr.gov/case/10-CA-221403) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

